

Supreme Court, U. S.
FILED

No. 75-1824

AUG 6 1976

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANTRANIK MALAJALIAN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1824

ANTRANIK MALAJALIAN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

The question presented in this federal income tax case is whether petitioner's repeated failure to obey the Court of Claims' order that he appear at scheduled hearings and testify with respect to his tax claim justified dismissal of his refund suit.

The pertinent facts are as follows: In June, 1972, petitioner, allegedly a citizen of Lebanon who entered the United States on a visitor's visa, attempted to depart from Logan Airport in Boston, Massachusetts, on a flight to London (Pet. App. 1). An inspection of petitioner's baggage by airline personnel revealed that he was carrying approximately \$147,000 in United States currency in small bills (Pet. App. 1-2). The airline personnel notified officials of the United States Customs Service of their discovery of the money. After a brief investigation, the Customs Service seized the money, but petitioner was allowed to depart the United States (Pet. App. 2). See *United States v. Tirinkian*, 488 F. 2d 873 (C.A. 2).

On June 26, 1972, the Commissioner of Internal Revenue terminated petitioner's taxable year, pursuant to his authority under Section 6851 of the Internal Revenue Code of 1954 (26 U.S.C.), and assessed income taxes and penalties of \$131,331.¹ The assessment was satisfied from the approximately \$147,000 seized from petitioner at the airport (Pet. App. 2). Thereafter, petitioner commenced this refund suit in the Court of Claims (Pet. 6).

On March 14, 1975, the Court of Claims ordered petitioner to appear at a hearing to be held in Boston to testify as to his tax claim (Pet. App. 7-8). After receiving instructions from petitioner's counsel as to the places where petitioner could be served with a copy of the court's order and an airline ticket, government counsel was unable to locate petitioner in either Beirut, Lebanon, or Lyon, France. After petitioner failed to appear at each of three hearings set within a six-month period, the trial judge, on October 3, 1975, recommended dismissal of petitioner's suit.² On the basis of that recommendation but with due regard to the "urgent plea" of petitioner's counsel that petitioner was in the French Foreign Legion,³ the Court of Claims, on November 14, 1975, ordered *en banc* that

another hearing be scheduled but provided that if petitioner "fails to comply * * * [his] petition may be dismissed" (Pet. App. 9, 10).

The new hearing was scheduled for January 8, 1976, and, upon information from petitioner's counsel that petitioner was in French Guiana, the government forwarded a copy of the court's orders of March 14, 1975, and November 14, 1975, to the nearest United States Consulate. However, petitioner's counsel later informed the court that petitioner would not be present at the scheduled hearing. On March 19, 1976, more than one year after petitioner was first ordered to appear, the court dismissed petitioner's suit (Pet. App. 11).

The Court of Claims did not abuse its discretion in dismissing petitioner's suit. Rule 102(b)(1) of the Rules of that court provides that "[u]pon its own motion, the court may dismiss any action at any time." The exercise of comparable authority by the federal district courts under Rule 41(b) of the Federal Rules of Civil Procedure was upheld in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 629-630. There, this Court held—

The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts.

The failure of a plaintiff to appear before the court when ordered to do so, or to submit to a deposition, is grounds for dismissal of his suit. See, e.g., *Buxton v. Aero Mayflower Transit Co.*, 18 Fed. Rules Serv. 2d 342 (C.A. 4); *Janousek v. French*, 287 F. 2d 616, 622 (C.A. 8); *Moore v. Island Creek Coal Co.*, 375 F. 2d 732 (C.A. 4); *Fischer v. Dover Steamship*

¹In *Laing v. United States*, 423 U.S. 161, the Court held that a notice of deficiency must be sent to a taxpayer within 60 days of a termination of a taxable year under Section 6851. A notice of deficiency was not issued to petitioner in this case. However, petitioner has never claimed at any stage of this litigation that the assessment was invalid. Thus, the only question presented is the propriety of the Court of Claims' dismissal of the suit.

²The trial judge's memorandum to the court dated October 3, 1975, is reproduced in the Appendix, *infra*, pp. 1a-4a.

³The government's information, subsequently confirmed by petitioner's counsel, was that petitioner was listed as a deserter from the French Foreign Legion (Pet. 6; Pet. App. 9).

Co., 218 F. 2d 682 (C.A. 2). Petitioner's failure for more than a year to respond to or obey the Court of Claims' repeated orders that he appear before the trial judge to testify justified dismissal.⁴

Finally, petitioner contends (Pet. 8-9) that the dismissal of his action deprived him of property without due process of law, in violation of his rights under the Fifth Amendment to the Constitution. But procedural due process does not require personal service of each and every order of a court on a party in litigation, particularly on the party who instituted the action. What is required is "notice reasonably calculated * * * to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314. Petitioner presumably knew of the pendency of the tax refund suit he allegedly authorized, and his counsel received more

than adequate notice of the scheduled hearings at which petitioner was ordered to appear.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

⁴Petitioner's contention (Pet. 8) that dismissal is unfair when, as here, he could not be located ignores the fact that it was his "duty to keep the court informed of * * * [his] correct address, and this failure * * * clearly warrants the * * * court in dismissing for failure to prosecute when * * * [he] failed to appear * * * "*Buxton v. Aero Mayflower Transit Co.*, *supra*, 18 Fed. Rules Serv. 2d at 344. See also *Mooney v. Central Motor Lines*, 222 F. 2d 569, 571-572 (C.A. 6).

Nor did any "great civil disorder in [petitioner's] country" (Pet. 2, 3) excuse his failure to appear before the court. There has been no showing that civil strife in Lebanon prevented petitioner from at least communicating his whereabouts to the court or his attorney. Moreover, it is far from certain that petitioner was ever in Lebanon during the pendency of the court's order. During these proceedings, counsel for petitioner repeatedly informed the court that petitioner was in the French Foreign Legion, stationed in France and subsequently in French Guiana. Thus, petitioner, by his own failure to act or even to inquire as to the status of his case, was responsible for the dismissal of his action.

APPENDIX

OCTOBER 3, 1975

FILED OCT. 3, 1975

COURT OF CLAIMS

MEMORANDUM

To: The Court

From: Mastin G. White, Senior Trial Judge

Subject: *Antranik Malajalian v. United States*, No. 421-73

It is recommended that the plaintiff be ordered to show cause why his motion for summary judgment should not be denied, and why his petition should not be dismissed, for failure to comply with the court's order of March 14, 1975.

The court's order directed that the plaintiff (who was then supposed to be in Beirut, Lebanon) appear before a trial judge in Boston, Massachusetts, at a time and at a place in Boston to be fixed subsequently by the trial judge, in order that the plaintiff might be examined by defendant's counsel pursuant to 28 U.S.C. § 2504, and also in order that the plaintiff might present evidence in support of his claim. The order further provided that the plaintiff's transportation by air to and from Boston was to be provided by the defendant.

On March 19, 1975, defendant's counsel filed with the court a document stating in part that the defendant "is willing to provide plaintiff with air transportation from Beirut, Lebanon, to Boston, Massachusetts, and return for the purpose of appearing at such hearing."

After obtaining information from the attorneys for the parties regarding commitments that should be considered in fixing a time for the hearing in Boston, the

attorneys were informed by letters dated April 22, 1975, that the hearing would be held beginning at 10 a.m. on June 16, 1975, in the courtroom of the U.S. Tax Court on the 13th floor of the U.S. Customs House, 2 India Street, Boston, Massachusetts.

In a letter dated April 29, 1975, plaintiff's counsel furnished to defendant's counsel an address in Beirut, Lebanon, at which, it was said, service upon the plaintiff of court orders could be accomplished.

The documents to be served on the plaintiff in accordance with the court's order of March 14, 1975, were sent to the American Embassy in Beirut on April 28, 1975, and information concerning the plaintiff's address in Beirut, as furnished by plaintiff's counsel, was supplied to the Embassy by means of a telegram dated May 5, 1975. However, the Embassy reported in a telegram dated May 13, 1975, that the plaintiff was not in Beirut, so far as could be ascertained, and that he was not well known at the address provided by plaintiff's counsel.

In a letter dated May 30, 1975, plaintiff's counsel informed the trial judge that, due to the civil strife prevailing in Lebanon, he had not been able to get a call through to Beirut; and he requested that the hearing in Boston be rescheduled for sometime after the situation in Lebanon returned to normal.

In view of the uncertainty as to whether the plaintiff was personally aware of the hearing scheduled for June 16, 1975, the hearing was rescheduled to begin at 10 a.m. on July 14, 1975, in the same courtroom previously mentioned. This action was taken on June 6, 1975. Subsequently, the July 14 hearing was cancelled on the basis of information furnished by plaintiff's counsel to the effect that, because of the continuing civil strife in Lebanon, counsel had been unable to communicate with the plaintiff either by mail or telephone, and did not know whether the plaintiff had received notice of the hearing.

In a letter dated August 6, 1975, plaintiff's counsel informed the trial judge as follows:

We have made contact with Mr. Malajalian who is in Lyon, France and not Beirut, Lebanon. If the government will notify an Embassy or Consul in France of its intention to pay the plane fare and give the way for granting a visa, we shall arrange to have Mr. Malajalian present himself at an Embassy or Consulate for that purpose.

Thereafter, the trial judge informed the attorneys for the parties, by means of letters dated August 14, 1975, that the hearing in Boston was rescheduled to begin at 10 a.m. on October 7, 1975, in the same courtroom previously mentioned. The letter directed defendant's counsel to furnish plaintiff's counsel not later than September 5, 1975, information as to where and when the plaintiff should report for his air transportation and his visa in connection with the trip to Boston; and directed plaintiff's counsel to inform the plaintiff promptly relative to the rescheduling of the hearing, and to transmit to the plaintiff promptly the transportation and visa information when received from defendant's counsel.

In a letter dated September 3, 1975, defendant's counsel informed plaintiff's counsel that the plaintiff could obtain from the U.S. Consulate in Lyon, France, on or after September 10, 1975, a Government Travel Request entitling him to a round-trip airline ticket from the airport nearest Lyon to Boston, and that the plaintiff could also submit to that consulate his application for a visa. The letter stated that the visa application should be submitted not later than September 19, 1975.

On September 24, 1975, defendant's counsel reported to the trial judge that, according to information received from the U.S. Consulate in Lyon, France, neither the plaintiff nor his attorney had been in touch with the

consulate concerning transportation or a visa for the plaintiff in connection with the trip to Boston for the October 7 hearing.

In a letter dated September 29, 1975, plaintiff's counsel informed the trial judge that, according to information received from reliable sources, the plaintiff "is presently in the French Foreign Legion," and that the plaintiff "obviously will not appear on October 7, 1975 * * *."

Because of the plaintiff's unavailability, the arrangements for the holding of a hearing in Boston on October 7, 1975, were cancelled.

It seems to be clear from the preceding recital that the plaintiff does not intend to appear at a hearing pursuant to the court's order of March 14, 1975, for the purpose of being examined by defendant's counsel in accordance with 28 U.S.C. § 2504, or for the purpose of presenting evidence in support of his claim. Accordingly, it seems appropriate that the plaintiff be ordered to show cause why his pending motion for summary judgment should not be denied, and why his petition should not be dismissed, for failure to comply with the court's order of March 14, 1975.